NO. 18546.

Supreme Court of the United States

OCTOBER TERM, 1903, NO. 58.

CITY OF OWENSBORO, ... Appellant.

vs.

OWENSBORO WATER WORKS COMPANY, OF OWENSBORO, KENTUCKY, ... Appellee.

BRIEF FOR APPELLEE.

May it please Your Honors:

Appellee, Owensboro Water Works Company, of Owensboro, Kentucky, through W. W. Davies and Robert W. Bingham, of counsel, calls attention to the following statement of the case now before Your Honors:

STATEMENT.

The bill of complaint of appellee, in this case, is based upon the following propositions: Appellee, the Owensboro Water Works Company, is a corporation, located within the corporate limits of the city of Owensboro, Kentucky. Its business is to furnish appellant, the City of Owensboro, for compensation, water for public purposes, and to furnish private consumers, for compensation, water for domestic purposes. Appellee has a contract with the City of Owensboro to furnish it water for public purposes. On the 19th day of March, 1900, appellant, City of Owensboro, passed and adopted an ordinance, approved by the mayor March 21, 1900, which impaired

and violated the rights of the company, acquired under its charter and under the laws of Kentucky and under the Constitution of the United States. It is alleged in the bill of complaint that the rates fixed by the ordinance of March 19, 1900, to be charged by the company for the water which it furnishes to private consumers, are so unreasonably low, ruinous and inadequate as to practically destroy the value of the company's property and to devote it to the use of the public rather than to the just use of the owner. In this way it violates the constitutional rights of the company, first, in taking its property for public use without just and fair compensation; second, in depriving it of its property without due process of law; third, in denying it the equal protection of the laws. The bill charges that the city has no authority to fix or regulate the company's water rates. The bill alleges that the Legislature of Kentucky has not, nor has any general law, at any time, conferred on the city of Owensboro (a city of the third class) any power or authority to fix or regulate water rates to be charged by the company to private consumers, or to make such regulations as the ordinance attempts to impose. It is alleged by the bill that such regulations are ruinous and oppressive. The bill charges that the ordinance of the city attempts to impose upon the company a number of unconstitutional and unjust regulations. The issues were made between the company and the city on these propositions in the court below. The circuit court held that the city had no power to fix the rates at which the company should furnish water to residents of the city of Owensboro, or to make certain oppressive regulations with respect to the company, and that the ordinance was void. An injunction and decree issued enjoining the city from enforcing its ordinance or from interfering, in any way, with the established and existing rates charged by the company. Thereupon an appeal was taken by the city to the

Circuit Court of Appeals, Sixth Circuit. Counsel for the company moved the dismissal of said appeal upon the ground that where the jurisdiction of the circuit court is based solely on the ground, clearly disclosed by the pleadings, that a law of a State is claimed to be in contravention of the Constitution of the United States, the parties being citizens of the same State, the Supreme Court has exclusive jurisdiction of an appeal in such case, and the appeal would not lie to the Circuit Court of Appeals, although other questions may also have been involved and may have determined the decision. The Circuit Court of Appeals sustained said motion of counsel for the company to dismiss the appeal, and the appeal was dismissed, as shown in the reported case of City of Owensboro v. Owensboro Water Works Company, 115 Federal Reporter, 318. In making said appeal to the Circuit Court of Appeals, counsel for the city appealed upon all questions of law and of fact in the case. After the dismissal of said appeal, counsel for the city brought this appeal to the Supreme Court.

POINTS.

I.

A MUNICIPAL ORDINANCE, PASSED UNDER SUPPOSED LEGISLATIVE AUTHORITY, IS REGARDED AS A LAW OF THE STATE WITHIN THE MEANING OF THE CONSTITUTIONAL PROHIBITION AGAINST STATE LAWS IMPAIRING THE OBLIGATIONS OF CONTRACTS AND OTHERWISE VIOLATING RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES.

II.

THE CITY OF OWENSBORO HAD NO POWER TO PASS THE ORDINANCE COMPLAINED OF, BECAUSE NEITHER THE CONSTITUTION NOR THE LAW OF KENTUCKY GIVES TO THE CITY OF OWENSBORO, A CITY OF THE THIRD CLASS, ANY POWER TO PASS OR ENFORCE AN ORDINANCE FIXING WATER RATES OF A PRIVATE COMPANY TO BE CHARGED TO PRIVATE CONSUMERS, AND SECTIONS 3290 AND 3438 OF THE STATUTES OF KENTUCKY, CONFERRING CERTAIN POWERS UPON CITIES OF THE THIRD CLASS, NEITHER DELEGATE TO SUCH CITIES POWER TO MAKE REGULATIONS FOR THE MANAGEMENT OF PRIVATE WATER COMPANIES, NOR POWER TO FIX OR REGULATE THE PRICES OF THEIR SUPPLY OF WATER TO PRIATE CONSUMERS. THE POWER TO REGULATE THE COMPANY OR FIX ITS PRIVATE RATES, IF NOT GRANTED TO THE CITY BY EXPRESS STATUTE OF THE STATE, IS NOT WITHIN THE GENERAL OR POLICE POWERS OF THE CITY.

III.

THE ORDINANCE, IF AUTHORIZED AT ALL BY ANY LAW OF THE STATE, SHOULD FIX RATES, TO BE CHARGED BY THE COMPANY TO PRIVATE CONSUMERS, WHICH ARE REASONABLE AND JUST, AND WHICH, IF PUT INTO EFFECT, WOULD ENABLE THE COMPANY TO EARN A FAIR PROFIT ON ITS INVESTMENT, AND WOULD NOT DEPRIVE THE COMPANY OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW AND WITHOUT JUST

COMPENSATION, AND WOULD NOT DEPRIVE THE COMPANY OF THE EQUAL PROTECTION OF THE LAWS.

IV.

THE EVIDENCE, IN ITS CHARACTER AND WEIGHT, SHOWS CONCLUSIVELY THAT THE ORDINANCE OF MARCH, 1900, IF ENFORCED, WOULD COMPEL THE COMPANY TO OPERATE AT A RUINOUS LOSS, AND, UNDER THE SCHEDULE OF RATES FIXED BY THE ORDINANCE, THE COMPANY WOULD BE UNABLE TO EARN ANY PROFIT ON ITS INVESTMENT. THIS IS SHOWN BY A COMPUTATION MADE EXCLUSIVELY FROM CONTENTIONS OF COUNSEL FOR THE CITY AND EVIDENCE FOR THE CITY.

V.

THE ORDINANCE ATTEMPTS TO MAKE CERTAIN RATES UNCOLLECTIBLE IN ADVANCE, BUT COLLECTIBLE ONLY AFTER THE WATER SERVICES TO CONSUMERS HAVE BEEN RENDERED. SUCH ATTEMPT BY THE ORDINANCE IS CONTRARY TO THE CONTRACT OF THE CITY WITH THE COMPANY, AND IT WOULD RESULT IN GREAT LOSS TO THE COMPANY. THE SET OF RULES FOR THE REGULATION OF THE COLLECTION OF RENTS BY THE COMPANY, PROMULGATED BY THE ORDINANCE, IS CONTRARY TO SUCH CONTRACT AND RUINOUS TO THE COMPANY.

VI.

THE UNJUST AND INIQUITOUS PROVISIONS OF THE ORDINANCE COMPLAINED OF (R., 31) ARE: (1) THAT THE COMPANY IS COMPELLED TO FURNISH WATER TO ALL MILLS, SALOONS, DISTILLERIES, BREWERIES, HOTELS, STREET RAILWAY COMPANIES AND OTHER LARGE PLANTS AT A RUINOUS RATE, FIXED BY THE SCALE OF DAILY QUANTITY USED, COMPUTED BY THE MONTH AND FIXED BY METER, WITH A PROVISION IN THE ORDINANCE THAT NO CONSUMER SHALL PAY OVER $24.00 A YEAR FOR WATER FURNISHED TO A CERTAIN AMOUNT; (2) THAT THE ORDINANCE COMPELS RUINOUS RATES FOR DOMESTIC SUPPLIES OF WATER WHERE THERE IS NO METER USED OR COMPELLED; (3) THAT RUINOUS RATES FOR SUPPLY OF WATER TO BANKS, STORES, OFFICES AND OTHER PLACES OF BUSINESS ARE COMPELLED, WITH POWER IN THE CONSUMER TO COMPEL THE PUTTING IN OF A METER ON REQUEST; (4) THAT THE COMPANY IS NOT ALLOWED TO PUT IN METERS, TO PREVENT WASTE, WITHOUT THE CONSENT OF THE CONSUMER OR THE MAYOR OF THE CITY; (5) THAT THE COMPANY IS NOT ALLOWED TO COLLECT ITS WATER RENTS IN ADVANCE WHERE THERE IS NEED OF ADVANCE COLLECTION, AND IS COMPELLED TO EXTEND HAZARDOUS CREDITS TO ALL CLASSES OF INHABITANTS; (6) THAT THE PRIVATE BOOKS AND ACCOUNTS OF THE COMPANY SHALL BE SUBJECT TO THE INQUISITION OF THE COMMON COUNCIL OF THE CITY, AND THAT A REPORT OF

THE PRIVATE AFFAIRS OF THE COMPANY SHALL BE MADE TO SUCH COUNCIL; (7) THAT THE COMPANY SHALL BE COMPELLED, AT THE WHIM OF CONSUMERS, TO LAY PIPES ANYWHERE IN THE CITY, UNDER ALL CIRCUMSTANCES, WITHOUT GUARANTEE OR SECURITY OF ANY KIND; (8) THAT THE COMPANY SHALL BE SUBJECT TO FINES AND PENALTIES IMPOSED AND ENFORCED BY THE CITY FOR THE VIOLATION OF THE PROVISIONS OF THE ORDINANCE.

ARGUMENT.

I.

The act of the city, in passing, adopting and standing ready to enforce the ordinance complained of, was a legislative act, and was under *supposed legislative authority* from the State. The *supposed* authority from the State was in sections 3290 and 3438, Kentucky Statutes, and in the general and police powers *supposed* to be accorded to cities of the third class. Proceeding under these *supposed* powers, accorded to the city by the State in statutes and general law, the ordinance was a legislative act, and its enforcement meant violations of constitutional rights. This principle has been thoroughly recognized and established.

Hamilton Gaslight, etc., Co. v. Hamilton, 146 U. S., 262-7.
Walla Walla v. Walla Walla W. Co., 172 U. S., 9, 10, 11.
Iron Mountain R. Co. v. Memphis, 96 Fed., 126.
Capital City Gas Co. v. Des Moines, 72 Fed., 818.
Owensboro W. Works Co. v. Owensboro, 115 Fed., 318.

In these cases, and in many others, it is unfailingly held that a *supposed power from the State,* such as counsel claims to appear in sections 3290 and 3438, Kentucky Statutes, and in the general law of the State, is all that is necessary to bring the consideration of the ordinance within the jurisdiction of the Federal Court. The city proceeded under its *supposed legislative* and *general-law powers,* coming to it from the State, and its ordinance falls within the scope of the National Constitution.

II.

We contend that the statutes do not confer upon the city any power to make rules or regulations for the company or to regulate the rates of the company. Their terms and meaning are contrary to any such interpretation. The able opinion of His Honor, Judge Walter Evans, in the circuit court, on page 55 of the record, is full of the clearest logic in the interpretation of section 3290. The statute is a part of the act for chartering and regulating cities of the third class in Kentucky. The act divides the various cities and towns of Kentucky, by name, into six classes, and Owensboro is designated as a city of the third class. We are, however, only interested, in this case, in the interpretation of the portions of the act as appear in sections 3290 and 3438 of the Kentucky Statutes. These sections deal with the question of waterworks and of water rates in cities of the third class. Therefore, it is under these sections that the council of the city of Owensboro passed, and attempts to enforce, the ordinance complained of. For our purposes section 3290, reads as follows:

> "The common council of said cities shall, within the limitations of the Constitution of the State, and this act, have power by ordinance . . . 5th, to provide the city and the inhabitants thereof with

> water, light, power, heat and telephone service, *by contract, or by works of its own,* located either within or beyond the boundaries of the city. To make regulations for the management *thereof,* and to fix and regulate the prices to private consumers and customers." (Our own italics.)

Neither the Court of Appeals of Kentucky, nor any other State court, has passed specifically upon the question raised in the case at bar, under section 3290, and the decision of His Honor, Judge Evans, is the only judicial interpretation yet given of the statute in relation to the question of the power of the city to fix the price of water furnished by a private company to customers and consumers. Judge Evans, on pages 55 and 56 of the record, in his opinion, says:

> "That the city is authorized to furnish water to *itself* and to its inhabitants by *contract* or by means of *works of its own* is apparent. What is the significance of the remaining words, namely, '*to make regulations for the management thereof,*' etc.? That the right to make regulations for the management *thereof* must have the words '*works of its own*' as its antecedent, seems to admit of no reasonable doubt. Those words could hardly refer to the word '*contract*' as their antecedent, because a contract must be an agreement between two or more persons, and it would seem certain that those words must refer to the phrase '*works of its own,*' inasmuch as it would not be possible, reasonably speaking, to allow the city alone to regulate a contract without the consent of the other party to it. And so in regard to the words '*fix and regulate the price thereof to private consumers and customers.*' They must be referred to the same antecedent, because the city alone could not, in the case of a contract, do anything of that kind. Anything of that sort must, in case of contract, be done by stipulation between the parties, and not by the action of any

> one of them. It would be much too loose a construction to hold that the last clause of subsection 5 reaches out after something not even alluded to in the section, to-wit, the right to fix prices charged by a private corporation which was the creature of the Legislature. All that was intended is that if the city had *works of its own*, and thereby supplied water to itself and its inhabitants, then, and in that event, it could fix and regulate the price to be charged private consumers as distinguished from itself." (Our own italics.)

We can not put the matter more plainly than the decision puts it. The statute can not allow a city council to fix the prices of water rates, because, as the able judge holds, a private company, furnishing water by *"contract,"* can not have its prices regulated arbitrarily, from time to time, by ordinance, because such would be repugnant to the most primary ideas of the force and effect of a *contract*. The last sentence of the portion of the act quoted, viz., *"to make regulations for the management thereof, and fix and regulate the prices to private consumers and customers,"* must refer to *"works of its own,"* because it can not refer to private works furnishing water upon private contracts to private consumers. If there is a contract, there must be considerations, and those considerations must be so arranged that they are not in the arbitrary control, for the purpose of alteration, of one of the contracting parties. It is possible that the statute may mean that the city council, by ordinance, has power to fix and regulate the price of water to private consumers by a *prearranged contract* with some company which proposes to build works in future and furnish the city with water upon the basis of the rates fixed by the ordinance and the prearranged contract, but the statute can not mean that the city council shall have power, by ordinance, to fix and regulate the prices charged by a company already established and furnishing water at the

time of the passage of said municipal corporations act, and before the passage of the ordinance. A reasonable and logical construction of section 3290 must, then, be, that the city council has power to fix and regulate the prices to be charged to private consumers by a company owned by the city or proposing to get a franchise to build works, and to contract for and to accept the rates fixed by the city, and to operate in the future upon the basis of prearranged and contractual rates.

In this connection we call attention to the case of Pikes Peak Power Co. v. City of Colorado Springs, 105 Fed., 9, 10. This case was decided in November, 1900, by the Circuit Court of Appeals for the Eighth Circuit. In the case there was involved the construction of a Colorado statute (page 9 of the decision), reading as follows:

> "They (city council) shall have power to purchase or erect waterworks or electric light works, or to authorize the erection of the same by others, but no such works shall be erected or authorized until a majority of the voters of the city or town who are taxpayers under the law, voting on the question at a general or special election, by vote approve the same."

The court was deciding whether or not this Colorado statute applied to works *owned or erected by the city* or to works *owned by other parties.* This is the identical question involved in the case at bar. The Circuit Court of Appeals said, on pages 9 and 10 of the decision:

> *"In the second place, the statute has no application to electric light plants erected by private parties for their own business purposes. It applies only to waterworks, gas works and electric light works purchased or erected by cities, or built by cities, under contracts with them, by other parties. It was not—it could not have been—the intention of the Legislature to require the approv-*

> ***ing vote of the majority of the taxpayers of a city every time its council issued a license to a corporation, partnership or person to erect or install a gas plant or an electric light plant upon its premises for domestic or business uses."***

The finding of the court was in strict accord with our contention as to the construction which should be put upon section 3290, Kentucky Statutes. The Kentucky statute, which enables a city of the third class (Owensboro) to provide the inhabitants with water *"by contract or by works of its own,"* and to make regulations for the management *"thereof,"* and to fix prices to be charged private consumers, is clearly, under the Pikes Peak case, to be held to mean that the city can regulate only works acquired by *contract* or *owned* by the municipality, and can only fix the rates of such works.

On September 10, 1878, the city of Owensboro passed and put into full force and effect an ordinance (R., 25-29) granting certain contractual rights, privileges and franchises to the *Owensboro Water Company*, which was a specific and clear contract between the city and said *Water Company*. In 1889, the city passed and adopted an ordinance making the *Owensboro Water Works Company* the complete successor to the old *Owensboro Water Company* in all the rights, powers, privileges, contracts and franchises inuring to said *Owensboro Water Company* under its contract-ordinance (R., 30). It is plain, then, that, by the ordinance of the city (R., 30), the *Owensboro Water Works Company* succeeded to and began the enjoyment of everything embraced in the original contract-ordinance passed in favor of the *Owensboro Water Company*. (R., 25; R., 30.)

So, then, the Owensboro Water Works Company was incorporated, had obtained its ordinance from the city, was under contract with the city, and was furnishing the inhabitants with water in 1889, before the passage of the

act of 1893, of which sections 3290 and 3438 are a part. At the time section 3290 was conceived and enacted by the Legislature, the company was incorporated and in full operation in the city of Owensboro, and it was then charging and collecting its customary rates for water furnished to private consumers. Under these facts it would be impossible, from a legal or logical standpoint, for section 3290 to confer the power on the city council to fix the prices of water furnished to consumers by a private company. The wording, history, circumstances and logic of the section are against such a meaning as this.

Construed under the following well-established rules, section 3290 can convey no power to the city to fix the rates of a private company.

A thing which is within the letter of a law is not within the law unless it is also within the meaning of the law, and the words of a statute, if sufficiently flexible, must be construed in the sense which is most in harmony with that meaning.

Pikes Peak Power Co. v. City of Colorado Springs, 105 Fed., 9, 10.
A. & E. Enc. of Law (1st Ed.), 23, 305 (notes).

It would not be within the meaning of the law that there should be a contract so different from all other contracts that it could be changed, abrogated, warped, distorted or made of no practical effect by the arbitrary act of one of the parties. Therefore, we say that the words of the statute are sufficiently flexible to be made to utter that which is within the meaning and spirit of the law.

Courts, in construing or interpreting a statute, give much weight to the interpretation put upon it at the time of its enactment, and since such time, by those whose duty it has been to construe, execute and apply.

A. & E. Enc. of Law (1st Ed.), 23, 339 (note).

The fact that for ten years the city of Owensboro and its officials had been construing and understanding section 3290 to mean that for which we contend, and the further fact that all the other cities of the third class in Kentucky have so understood the meaning of the statute that no case has arisen hitherto requiring any court to construe this statute, are of importance under the above rule.

The presumption is, that the Legislature does not intend to change or modify the law beyond what it explicitly declares, either in express terms or by unmistakable implications, for it is not to be supposed that the Legislature will overturn an established principle of law without expressing such intention with irresistible clearness.

A. & E. Enc. of Law (1st Ed.), 23, 357 (note).
Pikes Peak Power Co. v. City of Colorado Springs, 105 Fed., 9, 10.

It is perfectly clear that before the passage of the act of which section 3290 is a part, the law was just the reverse of that contended for by the city, and there was no such thing thought of in Kentucky as a city arbitrarily fixing and unfixing the prices of water to consumers. Even if the city attempts to enforce its ordinance, under section 3290, the power to enforce would, of necessity, have to be expressed in irresistibly clear and pointed language, which is, as we see, by no means the case.

In order to arrive at the true legislative intent, in construing doubtful statutes, that construction should be adopted which is most conformable to reason and justice, and the Legislature will not be presumed to have intended that which is against reason.

A. & E. Enc. of Law (1st Ed.), 23, 358 (note).
Samuels v. Commonwealth, 10 Bush (Ky.), 491.
Pikes Peak Power Co. v. City of Colorado Springs, 105 Fed., 9, 10.

Certainly the construction of section 3290 is in favor of our contention, as it is in harmony with the understanding of all the cities of the third class for the last ten years. It is in harmony with the common-law rights of the company, and it is in harmony with the doctrines of law regarding the term "contract" as used in the statute.

A statute is not to be construed to interfere with or injure rights of persons without compensation, unless there is no escape from such construction.

Endlich Int. Sts., sec. 25.
State v. Cin. Gas., etc., Co., 18 Ohio St., 301.

The common law will be held to be no further abrogated than is expressly declared, or the clear import of the language used absolutely requires. The law rather presumes that the Legislature did not intend to make any change other than what is specified and plainly pronounced. And even the liberal construction of remedial statutes may be modified by this rule.

A. & E. Enc. of Law (1st Ed.), 23, 388.
A. & E. Enc. of Law (1st Ed.), 23, 387.
Smith v. Moffat, 1 Barb. (N. Y.), 65.
Webb v. Mullin, 78 Ala., 111.

The common law will be held to be no further abrogated than is expressly declared, because, without constitutional or statutory change, the common law applies, and such principles of it apply to-day to the relations between the city and the company as have not been, by the clear language of Constitution or statute, abrogated. It must be remembered that section 3290 is a part of the general municipal-corporations act of the State of Kentucky. This general act makes and constitutes the general charters of the various cities and towns throughout the State. The cities and towns of Kentucky are unlike the cities and towns of many other States, in that their charters have

their existence in this one grand act. This act divides the cities and towns into classes, and makes various provisions for the different classes. In brief, *the act is the charter of the City of Owensboro,* and there is no other charter beyond this act. The city derives its powers from the act, and its powers are curtailed and circumscribed by the act. The city lives and breathes and moves, is checked, controlled, regulated, provided for and carried on under the provisions of this act.

It is a policy of the law to require of municipal corporations a strict observance of their powers. Any doubt or ambiguity arising out of the terms used by the legislature in making a grant of power must be resolved in favor of the public. A power can not be exercised where it is not clearly comprehended within the words of the chartering or empowering act, or derived therefrom by necessary implication.

Pikes Peak Power Co. v. City of Colorado Springs, 105 Fed., 9, 10.
Thomas v. Richmond, 12 Wall. (U. S.), 349.
Com. Nat'l Bank v. Iola, 2 Dill. (U. S.), 352.
Ottawa v. Carey, 108 U. S., 110.
Daviess County v. Dickinson, 117 U. S., 657.
Savannah v. Kelly, 108 U. S., 184.
Lewis v. Shreveport, 3 Woods (U. S.), 205.
Kelly v. Milan, 127 U. S., 139.
Norton v. Dyersburg, 127 U. S., 160.
Wells v. Supervisors, 102 U. S., 625.
Concord v. Robinson, 121 U. S., 165.
Katzenberger v. Aberdeen, 16 Fed. R., 745.
Wheatley v. Covington, 11 Bush (Ky.), 18.
Henderson v. Covington, 1¼ Bush (Ky.), 312.
Kniper v. Louisville, 7 Bush (Ky.), 599.
Barnett v. Dennison, 145 U. S., 139.
Hill v. Memphis, 134 U. S., 205.
City of Newport v. Newport Light Co., 84 Ky., 166.
City of Newport v. Newport Light Co., 89 Ky., 454.

We have cited above the two cases of *Wheatley v. Covington, 11 Bush (Ky.), 18,* and *Henderson, etc. v. Covington, etc., 14 Bush (Ky.), 312.* These two Kentucky cases are upon the construction of the legislative grant of power to the city of Covington. They bear upon the power of a city, under its charter, to tax the citizens in order to build a bridge. In regard to the powers of the city, *the Court of Appeals of Kentucky held that, as the powers delegated are sovereign powers, only such powers as were clearly intended will be regarded as having been granted.* The Newport cases, above cited, are by the Court of Appeals of Kentucky, and go so far as to uphold contractual rights to exclusive privileges and franchises in a lighting company in a city of Kentucky. Those exclusive rights are maintained against a city ordinance.

Opposing counsel has relied vaguely upon section 3438, Kentucky Statutes, which is said by counsel to confer authority upon the board of public works, or upon the common council of the city, to regulate the water rates of the company. Counsel has contended that, in the absence of a board of public works, the common council can exercise the powers of such board. Counsel relies upon the latter part of said section 3438, Kentucky Statutes, as conferring upon the council, in the absence of the board, the power to control and fix the rates to be charged to private consumers by the company. That section reads as follows:

> "The board of public works shall have the exclusive power and control over the construction, supervision, cleaning, sprinkling, repairing, grading and improving of all streets, alleys, avenues, lanes, public cemeteries, parks, squares, fountains, wharves and landings, market houses and places, bridges, sewers, drains, ditches, culverts, streams, canals and water courses, sidewalks, curbing and the lighting of all such public places as may be

deemed necessary within the corporation; to fix and establish the grades of all streets, alleys, avenues and thoroughfares; they also have the power, supervision and control over the construction, repairing, cleaning, lighting and heating of all public buildings, and over all public improvements of the city. They shall have exclusive power to make all improvements and expenditures, within the revenue limits allowed by the council, which shall cost less than five hundred dollars, but shall let all contracts over fifty dollars to the lowest responsible bidder after due advertising. The said board shall have the exclusive power to organize and control the fire department, the work-house, the hospital, the almshouse, the city prison, and such works as the city may *own* for supplying the city or the inhabitants thereof with water, light, heat or power." (Our own italics.)

There is not a sentence or word in this section (3438) which gives the council or board any power to organize or control or manage any other works than those which the city may *"own"* for supplying the inhabitants with water. This section specifically confines itself to granting powers of control to a board or council over works which the city may *"own"* in its own right and title for supplying the inhabitants with water. The city in no way *owns* the works of or any interest in this company. This section (3438) is also a part of the act of the Kentucky Legislature of 1893 in regard to cities of the third class, to which the city of Owensboro belongs. We repeat that in 1889 the company had been incorporated, was in possession of its contract rights and franchises, and was furnishing water in the city of Owensboro, and all of its powers, privileges, rights and franchises had inured to it as the successor of the old *Owensboro Water Company.* The same application to the above Kentucky statute (3438) is asked for the important case of *Pikes Peak Power Co. v. City of Colorado Springs, 105 Fed., 9, 10,* as was made

to section 3290 of the Kentucky Statutes. Section 3438 is far weaker in support of the city's claims than section 3290, and in both instances, under the *Pikes Peak case,* it must be held that the powers of the city are only over the regulations and rates of works of its *own* or works which it has *installed or enjoys by contract.*

It may be contended by the city that the power of fixing rates and making regulations, attempted to be exercised by the ordinance complained of, comes to the city out of its general or police powers if it does not come out of the powers conveyed in the statutes of Kentucky already discussed. Such a position can not be successfully held. Police powers constitute a broad subject, and we may safely state them to be *powers to make laws and regulations necessary for the protection of the comfort, health, morals, safety, convenience and general welfare of the public.* The question then arises whether the right of a city to cut private water rents, charged by a water company, half in two, is within such power. The ordinance complained of attempts to make a wholesale and arbitrary cut in the water rents charged by the company. Such proceeding by the city goes directly to the company's *contracts* and takes its property without due process of law and without equal protection of law. Counsel for the city may argue that, at least, the provisions of the ordinance in regard to meters are within the police power of the city. It must be remembered that the placing, under compulsion, of meters or the denial of the right to put in meters, is always and everywhere coupled in the ordinance with the unfailing and enforced plan of compelling the company to accept a ruinous reduction of its rates. *The meter is a hobby horse on which the city rides to the point of wholesale reduction of rates.* The enforcement of the meter is bound securely everywhere to the provision of *ruinously cheap water measured by a meter.* The real meaning of the *meter provision* is simply *unfairly cheap water running*

through a meter. The meter looks harmless, and it may be under certain circumstances, but the ordinance only hides behind the harmless meter to further its plan of *unjustly cheap water measured by meter.* The substance of all meter regulations in the ordinance is this, "the company *must* put in meters at certain places, *with reduced rates* for water measured in this way, and the company *shall not* put in meters in other cases, regardless of what the waste may be, without the consent of the consumer or the mayor." The gist of the ordinance is *wholesale reduction of rates*, and the meter is only applied to arrive at this wholesale reduction. If the city can not reduce the company's rates by direction, it can not reduce them by the indirection of meters. *Reduction* is what the ordinance arrives at first, last and always.

The attempt of the ordinance to compel the company to submit to the constant inspection of its private books, papers, accounts and records by the common council, and to compel the company to report its private business affairs to the officials of the city, is wholly out of the limits of police power. The city has no stock in the company. It is a stranger to the company, so far as private business affairs are concerned. An inquisition of private business accounts and affairs is not necessary to the *"protection of the comfort, health, morals, safety, convenience and general welfare of the public."* Such an inquisition by the city's officials can only mean "how much money are you making?" What does that matter to the officials so long as the service of the company is not against morals, safety, comfort, health, convenience and general welfare? Perhaps the city says, "I want to see your private books in order to regulate and reduce your rates." Here the city begs the question. We say to the city, "You have no right to reduce or regulate private water rates."

In *Lake Shore & M. S. R. Co. v. Smith, 173 U. S., 683-692,* Mr. Justice Peckham, considering a legislative re-

duction of prices to be charged for thousand-mile tickets by railroads, said, in part:

> "The right to claim from the company transportation at reduced rates by purchasing a certain amount of tickets is classed as a *convenience*. As so defined, it would be more convenient if the right could be claimed without any compensation whatever. *But such a right is not a convenience at all within the meaning of the term as used in relation to the subject of furnishing conveniences to the public.* And, also, the convenience which the Legislature is to protect is not the convenience of a small portion only of the persons who may travel on the road, while refusing such alleged convenience to all others; nor is the right to obtain tickets for less than the general and otherwise lawful rate to be properly described as a convenience. If that were true, the granting of the right to some portion of the public to ride free on all trains and at all times might be so described. What is covered by the word 'convenience,' it might be difficult to define for all cases, but we think it does not cover this case. An opportunity to purchase a thousand-mile ticket is improperly described as a convenience." (Our own italics.)

In New Orleans Gas, etc., Co. v. Louisiana Light, etc., Co., 115 U. S., 650, Mr. Justice Harlan, considering a city ordinance, which was alleged as violating exclusive and other rights of a gas company by a grant of a franchise to a competing company, said, in part:

> "Whatever, therefore, in the manufacture or distribution of gas in the city of New Orleans proves to be injurious to the public health, the public comfort or the public safety, may, notwithstanding the exclusive grant to plaintiff, be prohibited by legislation, or by municipal ordinance passed under legislative authority. It can not be said with pro-

priety that to sustain that grant is to obstruct the State in the exercise of her power to provide for the public protection, health and safety."

This case was one in which the contention arose that a denial to a State or city of the rights to disregard an exclusive franchise, and their right to grant a competing franchise, was depriving the State or city of its proper police or general power. Mr. Justice Harlan, as shown above, states clearly what things constitute the realm of police power. *The conclusion of the whole matter is that the police power of a State or city can not encroach upon rights secured by the Constitution of the United States.*

Walling v. Michigan, 116 U. S., 460.
Brennan v. Titusville, 153 U. S., 299.
In re Sam Kee, 31 Fed., 680.
In re Sing Too Quan, 43 Fed., 359.
In re Tie Loy, 46 Fed., 611.
In re Hong Wah, 82 Fed., 623.

We believe that the following doctrine is sound:

The police power is inherent in the State (the natural and original sovereign), but, in a city (an artificial and restricted sovereign), it exists only so far as the State has clearly granted it, by charter or statute, or as it is clearly necessary to or connected with the governmental nature of the city in protecting the public health, comfort, morals, convenience and welfare.

Wheatly v. Covington, 11 Bush (Ky.), 18.
Henderson v. Covington, etc., 14 Bush (Ky.), 312.

The Legislature of Kentucky has only, by its charter-statutes (sections 3290 and 3438, Kentucky Statutes), granted to Owensboro (a city of the third class) power to fix rates for and make regulations for works which the city *owns* or installs for itself or uses on *contract*. The city attempts, by its ordinance, to fix rates and regula-

tions for the company which it neither owns in its own right nor by contract. Smith, on The Modern Law of Municipal Corporations, section 1320, quotes from Horr & Bemis, Munic. Police Ordinances, section 211, to the following effect:

> "A grant of police power, however, can never be taken to authorize ordinances upon some subject which is partially or imperfectly given to the control of the corporation by an express grant, for the existence of the express grant shows that the legislative mind was specially directed to that subject, and the grant must be taken as the limit of its intention. And, where nearly all the ordinary police powers are made the subjects of express grants, only such additional ones can be exercised under a general grant of police power as are absolutely essential to the welfare of the community."

It is plain that the Legislature had granted to the city power to regulate and make rates for *works of its own* and works operated or controlled *on contract,* and that the subjects of fixing rates and rules had been granted so far and no further. Therefore, it is a reasonable rule to hold that the limited, but clear, grant of powers of control over certain kinds of waterworks excludes control, by statutory or police power, over the other and separate kind.

To close the matter of our contention in regard to the city's police power, we add that in 1889 the company began its life and labors under the contractual ordinance of the city (R., 25, 27, 28, 29, 30), which specifically granted the power to the company (R., 27) *"to make and enforce as part of the condition upon which it will supply water to its consumers, all needful rules and regulations not inconsistent with the law or provisions of this ordinance."* This was a contract, made by the city with the old *Owensboro Water Company,* and the company, this appellee, in

1889, by special ordinance of the city (R., 30), became the successor of said old company, and successor to all rights, benefits, franchises and powers residing in said old company. It may be safely claimed that the contract-ordinance gave to the company full powers to make its own rules in regard to meters or in regard to how water should be furnished and in regard to the rates to be charged.

III.

The city must have clear and positive legislative authority in sections 3290 and 3438, or one of them, or under the general or police law, to fix rates, and the rates when fixed, under a clear power, must be so fair, reasonable and just as to allow the company to earn a fair and reasonable return upon its investment.

Munn v. Illinois, 94 U. S., 113, is a case upon which opposing counsel will be likely to base the proposition that the legislative or councilmanic body is the sole judge of the reasonableness of rates established, and that only in the absence of a statute must the courts determine what is reasonable. This doctrine has not only been modified in several subsequent decisions of the Supreme Court on the question, but has been absolutely revolutionized, so that now the rule is firmly established, by the Supreme Court itself, that the courts in all cases must determine whether or not rates established are reasonable.

In Stone v. Farmers' Loan & Trust Co., 116 U. S., 331, the court, speaking through Chief Justice Waite, who delivered the opinion in the Munn case, says:

> "From what has been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights the State can not require a rail-

> road corporation to carry persons or property without reward; neither can it do that which in law amounts to the taking of private property for public use without just compensation, or without due process of law."

In Chicago, &c., Railway v. Minnesota, 134 U. S., 458, the court, speaking through Mr. Justice Blatchford, says:

> "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States, and, in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

The Granger cases and the case of Budd v. New York, 143 U. S., 517, may be relied upon by opposing counsel. An examination of these cases discloses the fact that their effect is simply to hold that a *State* may regulate rates and charges, but the question of the reasonableness of these charges was not involved in either of these cases.

The Budd case is referred to in Reagan v. Farmers' L. & T. Co., 154 U. S., 399, in the following language:

> "Budd v. New York, 143 U. S., 517, announces nothing to the contrary. The question there was not whether the rates were reasonable, but whether

> the business (that of elevating grain) was within legislative control as to the matter of rates. It was said in that opinion: 'In the cases before us, the records do not show that the charges fixed by the statutes are unreasonable.'"

In Reagan v. Farmers' L. & T. Co., 154 U. S., 397, the court says:

> "It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation, by a common carrier, of persons or property, is a legislative or administrative rather than a judicial function, yet it has always been recognized that if a carrier attempted to charge a shipper an unreasonable sum the courts had jurisdiction to inquire into that matter, and to award to the shipper any amount exacted from him in excess of a reasonable rate, and, also, in the reverse case, to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered, because the Legislature, instead of the carrier, prescribed the rates. The courts are not authorized to revise or change a body of rates imposed by the Legislature or a commission; they do not determine whether one rate is preferable to another, or what, under all circumstances, would be fair and reasonable as between the carriers and the shippers. They do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a Legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation."

It is thus manifest that the dictum in the opinion in the Munn case, that the question of the reasonableness of rates was purely a legislative and not a judicial one,

has been absolutely changed by the Supreme Court. The proposition laid down by Blatchford, J., that the reasonableness of rates established is a judicial question, has since been approved, and has become the settled rule.

Lake Shore, &c., Ry. v. Smith, 173 U. S., 687.
Reagan v. Farmers' L. & T. Co., 154 U. S., 397.
Gas Light Co. v. Cleveland, 71 Fed., 613.
Sou. Pac. Co. v. Board of R. R. Commissioners, 78 Fed., 236.
Interstate Commerce Commission v. R'y Co., 167 U. S., 500.

On November 25, 1901, the Supreme Court of the United States handed down the decision in the case of Cotting, etc., v. Godard, etc., 183 U. S., 79. This case is familiarly called "The Kansas City Stock Yards Case." It appears in this case that on March 3, 1897, the Legislature of Kansas passed an act defining what shall constitute public stock yards, defining the duties of the person or persons operating the same, and regulating all charges thereof. This act provided penalties for the violation of its provisions. The main purpose was to have declared invalid the above-mentioned act of the Kansas Legislature, and the main objections to such act, made by the stock yards company, were, that the act fixed charges for driving, yarding, watering, weighing or handling cattle which were unfair, unjust and unreasonable, and which, if adhered to, would work the taking of property without due process of law, without just compensation, and would force the stock yards company into a great, unjust and ruinous loss.

This "Kansas City Stock Yards Case" is a review of the whole question of reasonableness, and there is hardly an important authority upon the subject which it does not mention, criticise and differentiate. The case seems to be, and is, a final settlement of contentions in the conclusion that *where there is a power* to fix rates, that power

must be exercised only in making such rates as are fair, just and reasonable, and that it is a question of a judicial nature whether such rates are fair, just and reasonable, and that enactments which do not fix such rates are void.

The original cost of the construction of the company, the amount expended in improvements and annual repairs, the amount and value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under the rates prescribed, and the sum required to meet expenses, are all elements of inquiry and proper matters for consideration in arriving at what is reasonable and just.

San Diego Land Co. v. National City, 174 U. S., 757.
Smith v. Ames, 169 U. S., 546, 547.
Covington, &c., Turnpike Co. v. Standford, 164 U. S., 597.

IV.

We will, as briefly as possible, discuss the salient portions of the evidence going to show the value of the company's plant, its income, its bonded indebtedness, its expense, its depreciation and other matters affecting its earning capacity and bearing upon the unreasonableness of the rates which the ordinance attempts to saddle upon the company.

Mr. George Sidelinger testified for the company (R., 67). He is fifty-three years of age. He is the superintendent of the waterworks at Danville, Illinois. He has held his position there for eight years. He has been superintendent of waterworks in Kansas City and Grand Rapids. He has had experience in waterworks and in erecting waterworks in Massachusetts. He has made a thorough examination of the plant at Owensboro. He estimates that its cost of construction was $245,000 to $250,000. His

testimony shows him to be, in every respect, an expert upon waterworks.

Maj. Edward Hughes next testified for the company (R., 81). He is chief of the fire department at Louisville. He has held such position for twenty-one years. He has examined the plant at Owensboro *with respect to its capacity for fire protection. The plant is in excellent and thoroughly efficient condition for such purpose.* He is an expert upon fire protection.

Mr. Wm. J. McGonigale next testified for the company (R., 83). He is the secretary and treasurer of the company and holds the same office in several other water companies. He estimates the present value of the plant at Owensboro at **$235,000** to **$250,000**. He says that the annual operating expenses of the company are *$13,000.* The wear and tear, or depreciation, will amount to 3 or 4 per cent., which is *$9,000.* The taxes range from *$2,500* to *$3,000* per annum. He is familiar with the rules, regulations and rates of companies throughout the United States. *The rates fixed in the ordinance of March, 1900, are below the average rates throughout the country.* It would not be possible for the company to operate successfully without collecting its rates in advance. Any other method of collection would result in a loss of *fifty per cent.* He knows of no water company which does not collect in advance. There are between 1,200 and 1,300 consumers of water in Owensboro. *On the basis of the proposed ordinance the company would not receive revenue sufficient to pay its operating expenses and meet the natural wear and tear of the property, and would receive no return whatever upon the investment.* The ordinance would result in an actual loss of **$5,600** per year. This would be the result even if the company collected every dollar owing to it by consumers. The company has never paid any dividends to its stockholders, and he is in a position to *know this of his own knowledge.* The company lost money last

year. Under the proposed ordinance, the company would receive from domestic service *$11,500* per year, and from hydrant rental *$7,995*. The operating expenses are *$13,000* per year. The taxes at least are *$2,500* per year. The wear and tear, or depreciation, is *$9,000* per year. Even collecting its rates in advance, the company suffers a bad-debt loss of 20 per cent. The estimated loss, under the ordinance, of *$5,600* per year, did not take into consideration the uncollectible bills. The plant is in a most efficient condition as to fire protection. The bonded indebtedness of the company is *$235,000*. The gross income of the company for 1899 was about *$29,000*, and this included over *$2,000* received for water furnished in the previous year. The gross income for 1900 was over *$31,000*, and *$1,900* of this was for water furnished prior to 1900. During 1899 salaries amounted to *$4,139*. The bonded indebtedness of *$235,000* is secured by a mortgage on the plant, and the interest on the bonds is 5 per cent. per annum, except one lot of bonds worth *$5,000*, which bear 6 per cent. The interest account for the fiscal year of 1899 shows that the company paid *$12,064.95* for interest on its bonds. A reduction of rates by *33 1-3* per cent. will create a consumption of water which will increase the operating expenses. *$11,213.50* is the amount of the sinking fund charges. The company has been wisely and economically managed. If the ordinance were put into effect, the company would be forced to go into the hands of a receiver, as its loss would be great, and it could not stand such loss.

Mr. George J. Long next testified for the company (R., 103). He has been, all of his life, a manufacturer of water pipes. He has had considerable experience in the construction and management of water companies. He is now the president of a water company and is in active management of two others. He is able to estimate the value of the plant at Owensboro. He estimates the fair

cash value of the plant at Owensboro at **$225,000** to **$250,000**. It is in good condition. He is familiar with the past management of the plant at Owensboro. It is a well-managed property. He has examined the ordinance of March, 1900, and its enforcement would be ruinous to the company on account of the rates being too low. *The custom of water companies is to collect their rents in advance.* The ordinance of March, 1900, would compel the company to collect certain rates after the service had been rendered, and this would result in a great loss to the company. Such a plan as that proposed by the ordinance is not practicable. The plant at Owensboro can not be operated for less than *$12,500* per year as actual operating expenses. Three and one-half per cent. is a fair estimate for the wear and tear of the plant. He is not in any way interested himself in the plant at Owensboro. He has been interested in waterworks himself for over twenty years.

Mr. Alfred Walker next testified for the company (R., 109). He is in the waterworks contracting business, and has been for over forty years. He has built works in the large cities all over the United States, in Canada, and abroad. He has made a careful examination of the plant at Owensboro. The present fair cash value of that plant is, to-day, **$225,000** to **$230,000**. It can not be duplicated at these figures to-day. He is an expert in the value of labor and material for the erection of water plants.

Mr. Charles Hermany next testified for the company (R., 117). For forty-three years he has been actively engaged in the waterworks business in Louisville, Cincinnati, Nashville, Memphis, Bowling Green, Indianapolis, Milwaukee, Boston, Ft. Wayne and other places. Since 1860 he has been consulting engineer and designing engineer in the other places. He has made an examination of the waterworks system at Owensboro. The plant was in good and

efficient condition. He estimates the fair cash value of the plant at Owensboro at **$230,000.** *It is the universal rule, he says, of water companies to collect in advance, and there is a strong reason for this. The impressions made upon him are that the company, under the ordinance, if it were enforced, could not pay fixed charges.*

Mr. William Rudd next testified for the company (R., 125). He is an insurance agent in Owensboro. He has been in that business twenty years. On account of the improved efficiency of the fire protection from the water-works, in connection with the fire department, the insurance rates at Owensboro have been greatly reduced. The reduction of the rates of insurance was twenty-five per cent.

Mr. Asa Williams next testified for the company (R., 130). He is the engineer of the water company, and has been such for seven years. Gives detailed description of the water plant at Owensboro. Describes the pipe lines and the entire system. He displays and files a copy of the ordinance of March, 1900. The ordinance, according to his computation, would make a reduction in the receipts of the company of from thirty to fifty per cent. He says that the plant was remodeled about 1890, and the work of remodeling extended through three or four years. It was practically rebuilt. A new pump was put in. The pumps were put in separate wells. The works were duplicated, which is rendering them similar to works having two pumping stations, which are to be used in case there is a break-down. Before the election of the council which passed the ordinance, circulars were distributed in Owensboro promising that that council would reduce water rates.

Mr. Thomas Yeager next testified for the company (R., 148). He had been chief of the fire department at Owensboro for four years, up to the year in which he was testifying. He has been connected with the fire department of

Owensboro, more or less, since 1872. Since the refitting of the works the fire service has been all that could be required, and all that was needed or wanted by the city.

Mr. Henry Steubing next testified for the company (R., 149). He is the engineer of the waterworks at Evansville. He has been in the waterworks business since 1876. He is a civil engineer. He assisted in building the works at Louisville, Maysville and Evansville. He has made a careful examination of the plant at Owensboro. The cash value of the plant at Owensboro is **$257,000**. *It is as good a water plant as there is in the State of Kentucky.* He has examined the ordinance of March, 1900. The ordinance would reduce the collections of the company thirty per cent. *All the waterworks companies that he had ever heard of collect water rents in advance.* The rates fixed by the ordinance are lower than they are at Evansville. The rate of depreciation, or wear and tear, at Owensboro is about four per cent.

Mr. J. Tandy Ellis next testified for the company (R., 156). He is vice-president of the Owensboro Water Works Company. He resides at Owensboro. He had no notice, except a newspaper notice, of the intention of the council to pass the ordinance of March, 1900.

Mr. Owen Ford next testified for the company (R., 160 and 163). He is consulting and advising engineer. He has been retained in various enterprises for the planning, construction and building of waterworks in the United States and Mexico. He has constructed, or assisted in constructing, about two hundred water plants. The plant at Owensboro is in good condition, well designed, and is of modern construction and arrangement. In his opinion the fair cash value of the plant at Owensboro is **$250,000**. The depreciation, or wear and tear, of the plant is 3½ per cent. per annum. *The ordinance of March, 1900, is unreasonable with reference to the collection of water rates. The universal custom in all water plants is*

to collect in advance. Any other plan will result in great loss. The yearly cost of an economical running of the plant at Owensboro would be *$13,000*, not including the interest on bonds and taxes.

Mr. J. W. Holmes next testified upon interrogatories for the company (R., 167 and 172). He was engaged in the construction of waterworks from 1884 to 1892. Since that time he has been engaged in the manufacture of pipe and machinery for waterworks. Has made a thorough examination of the plant at Owensboro. He has most thorough knowledge of the plant in all its details. His evidence goes into the minutest details. He estimates the value of the pumping station at *$140,000*, and the value of the distributing system at *$140,000*. His total valuation of the plant is **$280,000**. He shows many details in regard to the reconstruction of the works.

Mr. Frank Schefold next testified for the company by interrogatories (R., 181 and 183). He has been engaged in the construction and operation of waterworks for over twenty years in various States of the Union. He is an expert on the cost of construction and operation of waterworks. He estimates the fair cash value of the plant at Owensboro at **$250,000**.

Then follow the witnesses for the city.

The first witness for the city was Mr. Charles L. Sturtevant. He is thirty-eight years old, and is a consulting engineer. He has designed and constructed several waterworks in various States. He estimates the cost of duplicating the plant at **$114,232**. And, strangely, then, in a few sentences after he makes this estimate, he values the works at a little more than **$76,000**. He does not know the rates which are charged in Louisville, Frankfort, Paducah, Nashville, Indianapolis or Knoxville. He has made no effort to compare the rates proposed by the ordinance with the rates in force in other towns in Ken-

tucky. *He is not familiar with the rules of any company in Henderson, Hopkinsville or any other Kentucky town.*

Mr. James P. Wiegal next testified for the city. He is superintendent of the waterworks at Henderson. He estimates the value of the Owensboro plant at $80,000. He says the expenses of running the plant at Henderson are $6,000 per annum. Henderson is a town of 12,000 people. The works at Henderson, for their construction, cost about $212,000.

Mr. Robert A. Cummings next testified for the city. He lives at Owensboro, and is a civil engineer and contractor. He estimates the cost of the plant at Owensboro at $119,981.25, and then strangely reduces the value of the works to a little over $87,000. Stranger still, he estimates the cost of duplicating the works at $124,500.

Mr. C. W. Bransford next testified for the city. He is engaged in the milling business at Owensboro. He is not satisfied with the price which he pays for water in Owensboro. He uses wells, which, he says, make a very cheap method for him of getting water to his mill.

Mr. Charles Broeker next testified for the city. He is in the milling business in Owensboro. He is not satisfied with the price which he pays for water at his mill. His mill is directly on the bank of the river. He gets his water easily and cheaply from the river at the door of his mill.

Mr. Charles A. Haney next testified for the city. He is chief of the fire department at Owensboro. He tells of the destructive fire at a warehouse filled with dried cornstalks, where he says that the water service would not extinguish the fire. He says that the stream of water would barely reach to the eaves of the roof of the building. He carried the nozzle up into a window. Then the stream of water reached a point which it would not reach at first. On cross-examination, he can not explain this strange

phenomenon in hydraulics and hydrostatics, that water will more than seek its level.

Mr. E. B. Shifley next testified for the city. He is the city engineer of Owensboro. He has had experience in laying pipe and constructing waterworks. He estimates the original cost of the plant at Owensboro at **$115,000.**

Mr. F. A. Ames next testified for the city. He is a carriage manufacturer at Owensboro. He has a factory which has an output of 5,700 carriages per year. He pays $5.00 a month for his water, and objects to paying that.

COMMENTS ON THE EVIDENCE.

The evidence of the company is presented by FOURTEEN WITNESSES. The evidence of the city is presented by EIGHT WITNESSES. The evidence of Mr. Charles Hermany for the company is that of a man known to this entire country as a finished expert upon waterworks matters. His reputation is universal, and he is a peer of the greatest waterworks engineers in America.

Maj. Hughes, chief of the fire department at Louisville, is the best authority upon efficiency of waterworks for fire protection.

Mr. McGonigale, for the company, testified as the only witness in the case who *knew* anything about the financial condition of the company. *He testified from the books of the company, and the books of the company were subject to the inspection of counsel for the city. He knows, with the books before him, that the depreciation is* $9,000 *and the total out-go is over* $30,000 *per annum.*

Mr. Sidelinger, Mr. Walker, Mr. Rudd and the others of the fourteen witnesses, are shown to be men who know what they are talking about from actual knowledge and experience.

Among the witnesses for the city are several dissatisfied manufacturers and councilmen. One of these has

an enormous plant, and pays $5.00 a month for water supplied to his plant. *He is thoroughly dissatisfied.* Another manufacturer has his factory standing on the bank of the river and prefers to get his water-supply out of the river. Water comes to him without much expense and without much trouble. He thinks the rates at Owensboro are too high. *The simian in a cocoanut tree can not understand evoluted man when he pays five cents apiece for cocoanuts!*

Mr. Haney, who testified for the city, is the chief of the fire department at Owensboro. He presents a novel proposition in hydraulics and hydrostatics. He says that the pressure would not throw the water to the eaves of the roof, but that, by carrying the hose one-half way up, *water will more than seek its level!* The fire, which it is alleged that the company's service could not control, was the conflagration of a warehouse filled with cornstalks, dried and ready for use at the cellulose factory.

Mr. Weigal, from Henderson, testifying for the city, says that Henderson is a town of *12,000* people, and that its works cost originally considerably over *$200,000.* Owensboro is a town of *18,000* or *20,000* people and *has much larger and better works than Henderson.* It is also true that the works at Henderson are owned by the city itself. He strangely puts the value of the works at the *little* town above that at the *big* town.

The evidence for the company is presented by a *larger* number of witnesses, and the character of their evidence is of a *clear* and *unimpeachable* nature.

V.

The ordinance complained of makes meter rates collectible only after the service has been rendered to the consumer. This is contrary to the contract of the city with the company, as evidenced by the ordinances of 1878 and 1889 (R., 25 and 30). The ordinance of 1878 was with

the *Owensboro Water Company*, and the present company, by the consent and adoption of the city, as evidenced in the ordinance of 1889, succeeded to all the rights of the original company (R., 30). This is conceded by the parties interested in this case. The ordinance of March, 1900, compels the company, contrary to the contract-ordinances of 1878 and 1889, to place meters with consumers who make certain demands for them. The ordinance of March, 1900, further compels the company to give written notice for ten days before shutting off water for nonpayment of rents. It also compels the company to submit its books and accounts at the end of each six months to the common council. For violation of the provisions of the ordinance the company is subject to a penalty. *All of these are rules and regulations upon which the company is to furnish water to consumers.* The contract-ordinances of the city with the company, of 1878 and 1889, are, in part, as follows (R., 27):

> "Sec. 9. The said company shall have the power and authority to make and enforce, as part of the condition upon which it will supply water to its customers, all needful *rules and regulations* not inconsistent with the law or the provisions of this ordinance.
>
> "Sec. 10. The said city will adopt and enforce ordinances protecting the said company in the safe and unmolested exercise of these franchises, and against fraud and imposition, and against injury to the hydrants rented by it to the said city, and against waste of water by consumers." (Our own italics.)

These ordinances of 1878 and 1889 are a solemn contract between the city and the company and give the company the right to make *"all needful rules and regulations"* with respect to its supply of water to the consumers of Owensboro. The city contracts to enforce ordinances to protect the company against imposition as to its regulations.

The ordinance of March, 1900, flies in the face of the contract-ordinances of 1878 and 1889, in that it takes away from the company the right to make its regulations for its supply of water. It clearly violates the solemn contract between the city and the company. We not only complain that the ordinance of March, 1900, fixes unreasonable rates and takes the property of the company, in violation of constitutional rights, but we show also that the regulations for the company, fixed by the ordinance of March, 1900, are contrary to and violative of the contract-ordinances of 1878 and 1889. The evidence will show, in an unmistakable manner, from the very best witnesses upon the subject, that the regulation of collecting rates only after service has been rendered will entail a serious loss to the company. Nearly every witness for the company testified to this fact. They were men who knew the waterworks business and spoke from experience. *We do not find that the evidence produced by counsel for the city even touches upon or denies that rates collectible only after the service is rendered would be harmful to the interests of the company. Upon this the witnesses for the city seem to be silent,* and the implication is that they know it to be a fact. *It is brought out strongly in all the evidence for the company, and must be recognized and taken as true.* It is a fact which common experience teaches. We recognize that such a ruinous regulation only applies to meter rates, but the ordinance of March, 1900, compels the placing of meters, and the obvious object of such compulsion is that the rates shall not be collectible in advance. The ruinous plan is gotten at in an indirect way, but it is clearly set up in the ordinance complained of. The plan would enable the shiftless and insolvent people of Owensboro to force the company to put in meters in order that they might be relieved of paying for their water in advance, and thus finally escape any payment whatever. Without further comment, we may confidently state that the contract-ordinances of

1878 and 1889, above quoted, clearly give to the company the right to make its *own rules and regulations* for supplying water to its customers. The ordinance of March, 1900, strikes at the plain meaning and attempts to violate the clear spirit of that contract. The provisions in the ordinance of March, 1900, compelling the company to give notice for ten days before it turns off the water of a delinquent is an open door for the escape of people who are not disposed to pay their debts. The subjecting of the books and financial affairs of the company every six months to the meddling of the city authorities is filled with populistic hindrances and troubles for the future. There is no regulation imposed by the ordinance of March, 1900, which does not hang a mill-stone around the neck of the company in the conduct of its internal affairs and in its relations with its customers and consumers.

VI.

We will, in detail, discuss the unjust and iniquitous provisions of the ordinance of March, 1900.

The *first* of these is compulsion, placed by the city upon the company, to furnish mills, manufacturing plants and other large establishments water at rates which experience has taught are far below the point where there is a possibility to make any profit whatever. The ordinance fixes a maximum yearly charge of $24.00 in cases where a certain amount of water is used, and it is possible, under such a condition of things, for a mill or factory or other plant to use a vast volume of water and still be liable for only $24.00 for the year's supply. A mill, factory or plant could, under these circumstances, turn in a flood of water from the pipes of the company and waste water to a ruinous extent and still not pay more than $24.00 per year. This would place the company at the mercy of the mills, factories and other plants enumerated in the ordinance.

This is surely contrary to the contract provisions of the ordinances passed in 1878 and 1889. The original contract-ordinance (R., 27) in favor of the company provided that *"said company shall have the power and authority to make and enforce, as part of the condition upon which it will supply water to its customers, all needful rules and regulations not inconsistent with the law or the provisions of this ordinance."* By that original ordinance the city agreed to adopt and enforce all means for the unmolested exercise of the rights and privileges and franchises guaranteed in said original ordinance, and especially against imposition upon the company by any one. The ordinance of March, 1900, invites imposition by mills, factories, hotels, distilleries and other large concerns by reason of the fact that the way is clear to a great waste of water, and a vast consumption of water, at the ruinous maximum rate of $24.00 per year.

The *second* respect in which the ordinance of March, 1900, is ruinous to the company is that it attempts to enforce unjust and unfair rates to private consumers where there is no meter used or no meter compelled or allowed. The evidence in this case has clearly shown that these rates to private consumers are unjust and unprofitable, and we will not discuss them further.

The *third* respect in which the ordinance of March, 1900, is ruinous and unjust is in the fact that it attempts to compel a supply of water to banks, stores, offices and other places of business, with the power in the consumers to compel the putting in of meters under a fine and penalty, without like power in the company to put in meters if necessary. The rule in regard to meters does not work both ways, and such rule is in violation of the original contract by the city with the company that the company should have the power to make its own rules and regulations as to the methods, ways and conditions of supplying water.

The *fourth* respect in which the ordinance of March,

1900, is unjust, unfair and ruinous is in the fact that it attempts to prevent the company from putting in meters where they are necessary and it is apparent there is waste, without the consent of the consumer or the mayor of the city. This is again a violation of the original contract-ordinance, under which the company operates, which gives to the company the right to *make rules and regulations as to the method and conditions of supplying water.*

The *fifth* respect in which the ordinance of March, 1900, is unjust and ruinous is in the fact that that ordinance does not allow the company to collect certain water rents in advance, and compels the company to extend hazardous credits to people of doubtful reputation and doubtful financial ability. It matters not how unable or unwilling a man is to pay for water supplied to him, the company must supply that water even with the certain knowledge that the water will be supplied at a total loss. The ordinance does not allow the taking of any money, thing or property, even as security, in such hazardous cases. Since 1889, when the company began its business in Owensboro, it has been collecting a good many of its water rents in advance, and such a rule was always recognized as a proper and binding rule under the aforesaid power of the company, guaranteed by the original contract ordinance of 1878, to *make its own rules and regulations in regard to supplying water to the inhabitants of the city.* The rule of collecting water rents monthly or quarterly in advance is a very necessary one in a good many cases and works well where a consumer is a permanent resident and uses so many hydrants, has so many rooms in his house, so many members of his family and so much stock in his barn. In cases of this kind the supply of water which is to be used can be well ascertained, and the rule of collecting rents in advance is a fair, just and reasonable one. Under the ordinance complained of, however, no questions can be asked about permanency of residence

or about ability or willingness to pay. The company must supply the consumer and wait until the end of the term to collect the rent, when the consumer has possibly removed from the city or is discovered to be absolutely insolvent. Such a condition of things does not allow the company to make or enforce *its own rules and regulations as guaranteed by the original contract-ordinances of 1878 and 1889.*

The *sixth* respect in which the ordinance of March, 1900, is unjust and ruinous is in the fact that it attempts periodically, and at all times, to expose the private books, accounts and affairs of the company to the inquisition of the common council of the city, and to force written reports of the private affairs of the company periodically before the council. Upon its face this is an outrage upon a private corporation and would subject the corporation to an endless chain of difficulties, dangers and troubles. It is certainly a needful rule that the company shall keep its own books and attend to its own affairs, and the contract-ordinances of 1878 and 1889 guarantee to the company the right to make *all needful rules and regulations with respect to carrying on its business.*

The *seventh* respect in which the ordinance of March, 1900, is unjust and ruinous to the company is in the fact that it attempts to compel the company, at its own expense, to lay pipes anywhere and everywhere in the city under all circumstances, at the mere whimsical request of prospective consumers, without guarantee or security of any kind. This forces the company to be subject to the whim of an alleged consumer when he notifies the company that an outlay of pipes is necessary to reach him and his alleged property at any point in the city. Such a rule might be a just one if it allowed the company to take some guarantee or security for the extra expense in placing new lines of pipe. The ordinance does not allow such guarantee or security, but compels the expense of laying new pipe lines

whenever and wherever an irresponsible consumer may request.

The *eighth* respect in which the ordinance of March, 1900, is unjust and ruinous is in the fact that it attempts to subject the company to fines and penalties, adjudicated and enforced by the city, for the violation of any of the provisions of said ordinance. This makes the city arbiter of almost every act of the company, and it is burdened with every conceivable injustice to the company.

CONCLUSION.

The average of the estimates made by the *many witnesses* for the company of the actual cash value of the plant at Owensboro, by the use of pencil and paper, is shown to be **$247,000**. The average valuation of the plant, according to the witnesses for the city, is **$109,000**. It is difficult to arrive at an exact average from the evidence of the witnesses for the city, for the reason that they draw a vague and uncertain distinction between the value of the works and what it costs to establish the works or duplicate them. Opposing counsel, in arguments in other courts, of his own free will and accord, *unsupported by the evidence*, however, frequently estimates the value of the works at **$90,000**. We may safely say that the average between the estimate of opposing counsel (*$90,000*) and the estimate of his witnesses (*$109,000*) is, in round and safe numbers, **$100,000**. Mr. McGonigale, for the company, assisted by the entire outfit of the books of the company, shows the following statement to be true:

Operating expenses	**$13,000**
Depreciation, or wear and tear	**9,000**
Present loss in bad debts (20 per cent.)	**6,200**
Taxes	**2,500**
Total out-go per annum	**$30,700**

Then we can safely say that $30,700 annually is what it costs to run the plant. *The evidence shows this clearly and plainly, and there is not a word in the evidence anywhere to break it down. This amount does not include interest on the bonds, which is $12,064.95. It does not include interest on the floating debt of $19,500. It only includes the actual operating expenses, the cost of repairs by reason of wear and tear, the loss by reason of bad debts contracted with people unable to pay their water rents, and the minimum taxes.* The maximum taxes are *$5,000.* These are the usual and legitimate and necessary expenses. They have nothing to do with the interest on the bonds, the floating debt or the interest on such floating debt. So then, by undisputed evidence, the necessary expenses of the company are $30,700 per annum. It is shown, and in nowise disputed, that the income of the company for 1899 was $29,764.29. It was shown in like manner that the income for 1900 was $31,577.43. These were the incomes for the fiscal years, and they include a large amount collected for water service rendered in previous years. Subtract $30,700 the actual running expenses, from $31,577.43, the maximum income of the company. This subtraction will show what we may call a net income of $877.43. Let us take the estimate of the value of the plant repeatedly made in the briefs of opposing counsel as a basis of calculation. His estimate is $90,000. The result is astonishing! ***We find that this so-called net profit of $877.43 is not one per cent. upon even the valuation placed by opposing counsel. It is not one per cent. upon $90,000. Is this unreasonable or unjust?*** We must remember that the works are unquestionably worth far more than *$90,000* or *$100,000,* and that the average estimate placed by the witnesses for the company is $247,000 *We must remember that our calculations do not take into consideration, in any way, the more*

than $12,000 *per year paid out as interest on the bonds, nor do we take into consideration the more than* $1,200 *a year paid to the sinking fund, nor do we take into consideration the floating debt of over* $19,000 *and the interest thereon.* The witnesses, without any dispute, estimated the reduction of income which would be brought about by the enforcement of the ordinance at from *thirty to fifty per cent.* Opposing counsel, by the import of his questions to the witnesses, places the reduction of receipts, under the ordinance, at *33 1-3 per cent.* He asks questions of the witnesses in which he incorporates that estimate as a basis of his questions. At any rate, the reduction brought about by the ordinance in the total receipts from the customers of the company would be *somewhere between thirty and fifty per cent.* On a basis of a reduction of even thirty per cent. the company would lose *$3,300* per year. This would entail a loss upon the company which would be ruinous, and if forced to undergo such a loss it would be compelled to give up all hope. According to the above, the company can not make one per cent., and if thirty per cent. of its receipts were taken away from it, it could not possibly figure out anything else than a great and ruinous loss. *If it should exist at all, it would be forced to exist for charitable purposes, and its stockholders would become public benefactors. We would reiterate that we have made our calculations upon the basis of the value of the plant fixed by our opponents.* We have not considered the bonds or the floating debt. We have granted our opponents, for the sake of argument, a perfect landslide of concessions. If we should argue the matter upon the basis of the average estimate of the value of the plant ($247,000), fixed by the witnesses for the company, we would show startling results in our favor. For the sake of argument we do not do this, but confine ourselves to undisputed evidence and to figures set by counsel and witnesses for the city. It must be remembered that Mr. McGonigale, the secretary

and treasurer of the company, was cross-examined by counsel for the city, and the books of the company were before the representative of the city. The only book that was absent was a small stock-book which had not been called for, and counsel for the city had full opportunity, by proper process, to see and examine all the books of the company. *There is no word in all the evidence to contradict the evidence of Mr. McGonigale as to the expenses of the company and as to the income of the company.* Opposing counsel was fishing after information, and it is no fault of any one that he caught fish which were not to his taste. By implication, he would have the court believe that the company is conducted on an extravagant plan, but he has produced no evidence to prove extravagance. The guesses of several witnesses, as to what it *ought* to cost to operate the company, are the only things upon which opposing counsel can rely.

In conclusion, we will say that we have not lost sight of the fact that we have a right to take into consideration the bonded indebtedness of the company as well as its floating debt, together with the sinking fund and the interest on the bonds and other debts. The cases which we have cited, under the proper head, bear us out in considering such things, *but we have seen fit to put the case, under the evidence, to this Honorable Court on the fighting ground of opposing counsel, and our computations have left out of consideration the large expense of paying interest upon the bonds and other debts.* We are clearly entitled to consider them in arriving at what is just, fair and reasonable in the way of rates. San Diego Land Co. v. Nat. City, 174 U. S., 757; Smith v. Ames, 169 U. S., 546; Covington v. Sanford, 164 U. S., 597.

We have shown (1) that the Federal court had jurisdiction. We have established (2) that the city had no right, by statute or police power, to pass the ordinance of March, 1900. We have established (3) that the rates fixed by the

ordinance are unreasonable. We have established (4) that, if the city had the right to fix rates at all by ordinance, those rates should be reasonable. We have established (5) that in consequence of the lack of power to make rates or regulations and the lack of reasonableness of rates the ordinance is void. We have established (6) that an enforcement of the ordinance will impose loss and ruin upon the company. We have established (7) that the ordinance of March, 1900, is violative of the contract-ordinances of 1878 and 1889 in attempting to impose regulations for the company's service, and violative of the company's constitutional rights.

Therefore we ask the Honorable Court to affirm the judgment of the circuit court.

Respectfully submitted,

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